

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )

IMPLEMENTATION OF THE LOCAL )  
COMPETITION PROVISIONS OF THE )  
TELECOMMUNICATIONS ACT )  
OF 1996 )  
\_\_\_\_\_ )

CC Docket No 96-98

**COMMENTS OF  
NEXTLINK COMMUNICATIONS, INC.**

**NEXTLINK COMMUNICATIONS, INC.**

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**SUMMARY**

NEXTLINK Communications, Inc. (“NEXTLINK”) hereby submits its comments in response to the Commission’s Second Further Notice of Proposed Rulemaking in the above-captioned proceeding. As a facilities-based competitive local exchange carrier (“CLEC”) with operations in fourteen (14) states, NEXTLINK has substantial experience operating under the Commission’s existing rules for network elements. NEXTLINK believes that a key to the continued development of local competition is the Commission’s adoption of unambiguous national unbundling requirements.

NEXTLINK supports the Commission’s tentative conclusion that it should identify a minimum set of network elements that must be unbundled on a nationwide basis. The rationale supporting the Commission’s decision in the First Local Competition Order to adopt a minimum list of network elements is still valid today. In fact, with nationwide entry by CLECs and consolidation among incumbent local exchange carriers (“ILECs”), the need for nationwide standards is even greater now than it was three years ago. NEXTLINK also supports the Commission’s proposal to allow state commissions to continue to require ILECs to provide additional network elements, but NEXTLINK is opposed to granting state commissions any authority to relieve ILECs of their obligations to provide those minimum network elements identified by the Commission under Section 251(d)(2).

NEXTLINK urges the Commission to identify standards for Section 251(d)(2) that promote the pro-competitive goals of the Telecommunications Act of 1996. Under either the “necessary” or “impair” standard the Commission should require ILECs to provide network elements unless potential alternatives present no material decrease in quality, increase in cost,

limitation in scope, or delay in bringing a competitive service offering to market. ILECs should be required to provide critical network elements unless there is a functioning wholesale market for that network element. In addition, for the purposes of Section 251(d)(2)(A), the Commission should identify as proprietary only those network elements where an ILEC's proprietary interest in a network element must be compromised by virtue of providing access to a CLEC. If a network element is proprietary under the Act, the ILEC must still provide the network element unless there are viable non-proprietary alternatives available to the CLEC that are not materially different in quality, cost, scope and timeliness.

The Commission should clarify its rules for network elements to reflect the practical experience of NEXTLINK and other carriers. NEXTLINK urges the Commission to confirm that ILECs must provide network elements that support all telecommunications services, including advanced, high-bandwidth services. The Commission should clarify that the definition of loop includes cross-connect facilities and conditioning necessary to provide any requested telecommunications service. The Commission should confirm that ILECs must make available to CLECs all loop facilities, including high capacity loops and dark fiber loops. The Commission should also specifically address access to loops provisioned by digital loop carrier facilities, extended loops and loops provisioned by remote switching units.

The Commission should affirm that the definition of interoffice transport includes entrance facilities and high capacity transport facilities. The Commission should also clarify that interoffice transport includes multiplexing functionality. In addition, the Commission should require ILECs to provide CLECs with access to Inside Wire, Network Interface Devices ("NIDs"), SS7 Signaling, Call-related Databases, and Operations Support Systems ("OSS"). Finally the Commission should explicitly require ILECs to provide CLECs with access to

combinations of network elements that are technically feasible and prohibit ILECs from restricting CLECs' use of those combinations. The Commission should also identify specific network element combinations, such as the loop and transport, that ILECs are required to provide under Rule 315(b) in order to avoid unnecessary disputes.

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**COMMENTS OF NEXTLINK COMMUNICATIONS, INC.**

NEXTLINK Communications, Inc. (“NEXTLINK”)<sup>1</sup> hereby submits its comments in response to the Commission’s Second Further Notice of Proposed Rulemaking (“Remand NPRM”) in the above-captioned proceeding.<sup>2</sup> NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates twenty-two (22) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-eight (38) markets in fourteen (14) states.<sup>3</sup> In many of its markets, NEXTLINK is the largest purchaser of unbundled network elements (“UNEs”) from the incumbent local exchange carrier (“ILEC”). NEXTLINK, therefore, has substantial experience operating under the Commission’s

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<sup>1</sup> NEXTLINK Communications, Inc. provides local exchange, access and interexchange services through its affiliate companies: NEXTLINK California, Inc., NEXTLINK Colorado L.L.C, NEXTLINK Florida, Inc., NEXTLINK Georgia, Inc., NEXTLINK Illinois, Inc., NEXTLINK New Jersey, Inc., NEXTLINK New York, Inc., NEXTLINK Ohio, Inc., NEXTLINK Pennsylvania, L.P., NEXTLINK Tennessee, L.L.C., NEXTLINK Texas, Inc., NEXTLINK Utah, Inc., NEXTLINK Washington, Inc., and Telecommunications of Nevada, L.L.C. All references to NEXTLINK are to NEXTLINK Communications, Inc., and the operations of all its local exchange affiliate companies unless otherwise noted.

<sup>2</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking (rel. April 16, 1999) (“Remand NPRM”).

<sup>3</sup> NEXTLINK is also the largest holder of fixed wireless spectrum in North America, with LMDS licenses covering ninety-five (95) percent of the population in the top thirty (30) markets in the United States.



prior definitions and rulings of what constitutes an unbundled network element. Based on its experience and that of other carriers since the 1996 Act, NEXTLINK urges the Commission not only to respond to the Supreme Court's remand, but also to refine and clarify its definitions of network elements and rules regarding access to those elements.

**I. THE COMMISSION SHOULD ADOPT RULES FOR NETWORK ELEMENTS THAT UNAMBIGUOUSLY REQUIRE ILECS TO PROVIDE A MINIMUM NATIONAL SET OF NETWORK ELEMENTS UNDER THE STANDARDS OF SECTION 251(d)(2) AND PROVIDE CLEAR AND SPECIFIC DEFINITIONS FOR REQUIRED NETWORK ELEMENTS.**

NEXTLINK believes that for competition to grow it is imperative that the Commission to adopt rules for access to network elements that address not only which network elements must be made available to competitive LECs ("CLECS"), but that clearly define those network elements and the manner in which CLECs may obtain access to them. The United States Supreme Court's decision in AT&T Corp v. Iowa Utils. Bd. broadly affirmed the Commission's plenary authority to promulgate rules to enforce the provisions of the Communications Act.<sup>4</sup> The Commission, therefore, has the necessary authority to identify and define individual network elements, so long as the Commission's definition complies with the Act's broad definition of a network element.<sup>5</sup> Once the Commission has determined that a network element must be made available under Section 251(d)(2), Section 251(c)(3) requires that ILECs provide those network elements on an unbundled basis<sup>6</sup> at any technically feasible point.<sup>7</sup> If the Commission fails to do so,

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<sup>4</sup> Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8<sup>th</sup> Cir. 1997) ("Iowa Utils. Bd. v. FCC"), cert. granted sub nom., AT&T Corp. v. Iowa Utils. Bd., 118 S.Ct. 879 (1998), aff'd in part, rev'd in part, 119 S.Ct. 721 (1999) ("AT&T v. Iowa Utils. Bd.").

<sup>5</sup> AT&T v. Iowa Utils Bd. at 733-34. See also Southwestern Bell Telephone Co., et al. v. FCC, et al., 1998 WL 45936 (8<sup>th</sup> Cir) (1998).

<sup>6</sup> Unbundling clearly refers only to an economic unbundling of the price for a specific network element from other facilities and services offered by the incumbent LEC. See AT&T v. Iowa  
(continued...)

ILECs will continue to exploit every perceived ambiguity or loophole to increase the cost of entry of new competitors and delay competition.

**A. National Uniform Minimum Standards for Unbundling of Network Elements are Essential to the Continued Development of Sustainable Local Competition.**

NEXTLINK supports the Commission's tentative decision to identify a minimum set of network elements that must be unbundled on a nationwide basis.<sup>8</sup> In the First Local Competition Order, the Commission concluded that the pro-competitive goals of the 1996 Act would be best achieved through the adoption of a "minimum list of unbundled network elements that incumbent LECs must make available to new entrants upon request."<sup>9</sup> The Commission found that a list of network elements available on a national basis would allow: (1) requesting carriers to take advantage of the ILECs economies of scale; (2) provide financial markets greater certainty as to CLECs' business plans; (3) facilitate state commission's arbitration of interconnection disputes; and (4) reduce the level of litigation over the requirements of the Act.<sup>10</sup> In the three years since the Commission's initial implementation of the 1996 Act, the rationale for the adoption of a national list of network elements has not changed. Indeed, the need for national standards is even greater now as both ILECs, through consolidation and merger, and

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Utils Bd. at 737. The Supreme Court rejected the Eighth Circuit's erroneous interpretation that unbundling required the physical separation of piece-parts of the incumbent's network. Id.

<sup>7</sup> 47 U.S.C. § 251(c)(3). See AT&T v. Iowa Utils. Bd. at 736 ("Section 251(c)(3) indicates 'where unbundled access must occur, not which [network] elements must be unbundled.'" (citing Iowa Utils. Bd. v. FCC, at 810).

<sup>8</sup> Remand NPRM at para. 14.

<sup>9</sup> See Implementation of the Local Telecommunications Provisions of the 1996 Act, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("First Local Competition Order") at 15624.

<sup>10</sup> Id., 11 FCC Rcd at 15624- 27.

CLECs, through expansion of competitive entry, provide service on an increasingly national basis. In fact, the Commission recently affirmed the necessity of a national approach in its Advanced Services Order by adopting nationwide rules to ensure the rapid deployment of advanced services was not impeded by unnecessary litigation and disputes over collocation arrangements.<sup>11</sup> The Commission, therefore, should adopt the tentative conclusion it reached in the Remand NPRM and establish nationwide minimum standards for network elements.<sup>12</sup>

In the Local Competition Order, the Commission agreed with the conclusions of the Department of Justice that there is “no basis in economic theory or in experience to expect incumbent monopolists to quickly negotiate arrangements to facilitate disciplining entry by would be competitors, absent clear legal requirements to do so.”<sup>13</sup> The experience of new entrants in the three years since the passage of the 1996 Act and the First Local Competition Order bears out the wisdom of the Commission’s conclusion. Almost uniformly, competitive carriers have obtained those network elements that the Commission unambiguously required ILECs to provide to requesting carriers only after extraordinary effort.<sup>14</sup> It is therefore unsurprising that new entrants have had little success in reaching voluntary agreement with

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<sup>11</sup> See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (rel. March 31, 1999) (“First Advanced Services Order”) at para. 23. The Commission noted that its new collocation rules apply to all telecommunications services, including advanced services and traditional voice services. Id. Not surprisingly, incumbent LECs were again uniformly opposed to national rules. Id. at n. 42.

<sup>12</sup> Remand NPRM at para. 14.

<sup>13</sup> See First Local Competition Order, 11 FCC Rcd at 15624 (citing Department of Justice Comments in CC Docket No 96-98 at 8-15).

<sup>14</sup> For example, NEXTLINK has had difficulties in obtaining loops port because ILECs have argued that they NEXTLINK was actually requesting combinations, i.e., a loop and a cross-connect. NEXTLINK has also had to engage in protracted negotiations and arbitrations in order to ensure through performance standards and remedies that its access to loops and other network elements is on a nondiscriminatory basis.

incumbents to obtain access to additional network elements. New entrants continue to suffer from a lack of bargaining power vis-a-vis ILECs and clear national rules identifying a minimum list of available network elements remains critical to reducing the amount of unnecessary litigation over access to those network elements.

The existence of national rules for network elements is necessary for the development of competition on a national basis, one of the key goals of the 1996 Act.<sup>15</sup> Because of the certainty and economies of scale provided by uniform nationwide availability of network elements, several new entrants, including NEXTLINK, have pursued a national entry strategy by building out facilities and competing in each region of the country in a manner that takes advantage of efficiencies in provisioning and operating new networks. Although NEXTLINK has encountered many difficulties in obtaining nondiscriminatory access to network elements on just and reasonable terms where the Commission did not clearly define either the network elements or methods of access to them, the Commission's initial decision to require ILECs to provide a minimum national list of network elements has helped minimize repetitive and unnecessary litigation over the availability of network elements critical to entry by NEXTLINK. NEXTLINK's experience thus confirms that the Commission was correct in concluding that "[n]ational requirements for unbundled elements will allow new entrants, including small entities, seeking to enter local markets on a national or regional scale to take advantage of economies of scale in network design."<sup>16</sup>

Providing state commissions with authority under the Act to remove items from a national list of required network elements will severely undermine the value of a national

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<sup>15</sup> S. Conf. Rep. No 104-230, 104<sup>th</sup> Cong., 2d Sess. 1 (1996) (Joint Explanatory Statement).

minimum list of network elements.<sup>17</sup> NEXTLINK, therefore, is strongly opposed to providing state commissions the authority to eliminate incumbent LEC obligations to provide those network elements that the Commission initially requires under Section 251(d)(2). Such state authority could further delay competitive entry by requiring CLECs to devise individual entry strategies to accommodate the lack of access to critical network elements in individual states. It would also subject CLECs to litigation in multiple states over access to network elements. The Commission, therefore, should not provide state commissions with the authority to lower the “floor” of available network elements.

In contrast, the Commission is correct in its tentative conclusion to continue to allow state commissions to require ILECs to provide additional network elements under the criteria and standards adopted by the Commission in this proceeding.<sup>18</sup> Allowing state commissions to raise the “ceiling” of network elements available in any state may serve individual state conditions and policies, and do so without disrupting CLECs’ ability to gain access to the same network elements on a national basis. Further, as the Commission observed in its First Local Competition Order, and as the course of arbitration proceedings under the Act has demonstrated,<sup>19</sup> state

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<sup>16</sup> See First Local Competition Order, 11 FCC Rcd at 15624.

<sup>17</sup> State Commissions may have other authority under state law to impose additional obligations on incumbent LECs so as long as they are not inconsistent with the Act. A state commission, therefore, could impose under state law, additional obligations on an incumbent LEC to provide network elements. But a state commission could not relieve an incumbent LEC of its obligation to provide a network element the incumbent is required by the Commission to provide under Section 251(d)(2). See 47 USC § 251(d)(3).

<sup>18</sup> Remand NPRM at para. 14.

<sup>19</sup> For example, the Utah Public Service Commission recently required U S WEST to provide NEXTLINK with access to NEXTLINK’s requested SS7 network configuration. See Petition of NEXTLINK OF Utah, Inc., for Arbitration of a Second Interconnection Agreement with US WEST Communications, Inc., pursuant to 47 U.S.C. § 252, Arbitration Award, Docket No. 98-2208-03 (March 23, 1999) (“NEXTLINK Utah Arbitration Award”). NEXTLINK has also had  
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commissions have made significant contributions to the development of local competition and their continued ability to require the provision of additional network elements as services and technologies change will protect their role as innovators in the development of local competition.<sup>20</sup>

**B. The Commission Should Adopt Standards for “Necessary” and “Impair” That Provide Certainty to New Entrants and Maintains the Viability of Network Elements as a Method of Entry.**

The Supreme Court vacated 47 C.F.R. §51.319 of the Commission’s rules, finding that the Commission had not adequately considered the “necessary” and “impair” standards of Section 251(d)(2) in determining the network elements that must be provided by ILECs.<sup>21</sup> The Supreme Court also concluded that it was not reasonable for the Commission to interpret the standards in Section 251(d)(2) to exclude any comparison between incumbent facilities and the possibility for self-provision by the requesting carrier or the use of equivalent facilities from a third-party provider. On remand, the Court directed the Commission to determine “on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the ‘necessary’ and ‘impair’ requirements.”<sup>22</sup> The Commission, therefore, must provide a meaningful interpretation of the standards in Section 251(d)(2) that promotes the goals of the Act, *i.e.*, to further full competition in local

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some success in obtaining favorable decision regarding access to extended loops. Petition of NEXTLINK Pennsylvania, L.L.P. for Arbitration of an Interconnection Agreement with Bell Atlantic-PA, Inc., Pursuant to the Telecommunications Act of 1996, Final Order, A-310260F0002 (July 15, 1998) (“NEXTLINK Pennsylvania Final Order”); NEXTLINK Utah Arbitration Award.

<sup>20</sup> See First Local Competition Order, 11 FCC Rcd at 15566-68.

<sup>21</sup> AT&T v. Iowa Utils. Bd., at 733-36.

<sup>22</sup> Id., at 734-35.

telecommunications markets. NEXTLINK agrees with the Commission's assessment that "[a]lthough the Supreme Court acknowledged arguments by incumbent LECs that section 251(d)(2) codifies 'something akin' to the essential facilities doctrine, the Court did not embrace that argument or find that section 251(d)(2) mandates that standard."<sup>23</sup> By using the words "necessary" and "impair," Congress employed its own distinct standards for unbundling, without reference to the essential facilities doctrine or its tenets. The Commission, therefore, has no obligation to consider and should not rely on essential facilities jurisprudence in implementing Section 251(d)(2) of the Act.

**1. The Necessary Standard in Section 251(d)(2)(A).**

NEXTLINK discusses below the factors the Commission should consider in implementing a standard for Section 251(d)(2)(A) that ensures facilities-based CLECs the access to network elements they need to compete with entrenched monopoly incumbent providers.

**a. The Necessary Standard Applies Only with Respect to Proprietary Network Elements.**

The plain language of Section 251(d)(2)(A) provides that the necessary standard must be considered only when "proprietary" network elements are at issue. The Commission correctly reached this conclusion in the First Local Competition Order analysis of the necessary and impair standards, the Eighth Circuit applied the same construction, and the Supreme Court's decision did not question this conclusion.<sup>24</sup> In the Remand NPRM, the Commission seeks

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<sup>23</sup> Remand NPRM at para. 21. In its Reply Brief filed with the Supreme Court in AT&T v. Iowa Utils. Bd., the Commission noted that "the antitrust term 'essential facilities' does not appear anywhere in this statute. Instead, Congress chose other words with quite different meanings." Reply Brief for the Federal Petitioners and Brief for the Federal Cross Respondents AT&T v. Iowa Utils. Bd., at 43 (filed June 1998).

<sup>24</sup> See Remand NPRM at para. 19; First Local Competition Order, 11 FCC Rcd at 15640-45; Iowa Utils. Bd. v. FCC, at 811 n.31; AT&T v. Iowa Utils. Bd., at 734-36.

comment on the meaning of the term “proprietary.”<sup>25</sup> In the First Local Competition Order, the Commission referred to proprietary network elements as including, for example, “those elements with proprietary protocols or elements containing proprietary information.”<sup>26</sup> The Commission also acknowledged that a meaningful distinction could be made on the basis of whether proprietary information would be revealed as a result of providing unbundled access to a particular element.<sup>27</sup>

In general, NEXTLINK supports the Commission’s current approach to identifying as proprietary only those network elements that genuinely raise concerns that an ILEC’s proprietary interest in a network element could be compromised, *i.e.*, it would lose control over *its* intellectual property by mere virtue of the fact that it allowed access to an element. NEXTLINK also supports the comments of ALTS in this proceeding concerning additional rules the Commission should adopt to further clarify the parameters of what constitutes a “proprietary” interest for the purposes of Section 251(d)(2)(A).

The Commission should also make it clear that the term “proprietary” refers solely to the interests of the ILEC at issue. ILECs should not be able to claim third-party proprietary interests, such as those of vendors, as their own to assert that the ILEC provision of a network element is proprietary. Indeed, the Commission should make clear that ILECs must secure agreements with their vendors that conform with their statutory obligation to provide unbundled access to network elements so that such agreements cannot be used by ILECs to avoid their unbundling obligations.

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<sup>25</sup> Remand NPRM at para. 15.

<sup>26</sup> First Local Competition Order 11 FCC Rcd at 15641-42.

<sup>27</sup> Id., 11 FCC Rcd at 15642, 15694.



Furthermore, the necessary standard should be triggered only when proprietary aspects of a network element must be revealed when the particular element is unbundled.<sup>28</sup> If it is technically feasible to unbundle an element in a manner that does not require the ILEC to disclose information that an ILEC claims is proprietary, the element should not be considered “proprietary” for the purposes of Section 251(d)(2)(A).<sup>29</sup>

In general, NEXTLINK concurs with the parameters of the Commission’s Local Competition Order and Remand NPRM limiting possible ILEC “proprietary” claims. Industry-wide protocols such as the signaling protocols that adhere to Telcordia (formerly Bellcore) standards are not proprietary in nature, and certainly ILECs do not have a proprietary interest in them to protect.<sup>30</sup> As suggested in the Remand NPRM, moreover, the same rationale should be extended to other industry-wide standards.<sup>31</sup>

**b. Unbundled Access to a Proprietary Network Element Is Necessary if No Reasonable Substitute Is Available from the ILEC, through Self-Provisioning, or from Another Non-ILEC Source.**

Only when a “proprietary” interest is implicated in the provision of access to a network element will the Commission have to determine whether in fact it is necessary for an incumbent ILEC to provide the network element. Consistent with the Supreme Court’s mandate that the

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<sup>28</sup> Remand NPRM at para. 15 (“If a network element contains what parties assert to be proprietary information, but access to that information is not accessible by third parties seeking access to a particular element, should the entire element be considered proprietary for the purposes of section 252(d)(2)(A)?”).

<sup>29</sup> Id. at para.15 (“Commenters should discuss whether the term “proprietary” should be limited to information, software, or technology that can be protected by patents, copyrights, or trade secrecy laws, or whether it can also apply to materials that do not qualify for such legal protection.”).

<sup>30</sup> First Local Competition Order, 11 FCC Rcd at 15739-40.

<sup>31</sup> Remand NPRM at para. 15.

Commission must give substance to the “necessary” requirement and, in so doing, cannot disregard the availability of elements outside the incumbents’ network, NEXTLINK supports the proposed standard in ALTS’s comments in this proceeding.

**1) Factors.**

In determining whether unbundling of a proprietary network element is necessary, the Commission must evaluate whether comparable functionality can be obtained through unbundled access to non-proprietary ILEC network elements, through self-provisioning, or from a another non-ILEC source. The Commission must not, however, stop its analysis there. To be an effective substitute, an alternative network element must be one that not only could but would be used by efficient competitors. The availability of any alternative does not act as a bar to meeting the statutory unbundling standard. Unless the alternative network element can be substituted in a way that results in no material decrease in quality, increase in cost, limitation in scope, or delay in bringing a competitive service offering to market, its availability is irrelevant to the statutory test, as it would not provide CLECs with an effective means to compete.

**2) Sources.**

The Supreme Court’s opinion requires that the Commission, in applying the necessary standard, look to sources beyond the ILECs’ networks. In determining whether the necessary standard is met, therefore, the Commission should evaluate whether a reasonably substitutable non-proprietary network element is available from the ILEC, and whether substitute functionality can be obtained through non-ILEC sources, including self-provisioning and competitive vendors.

- ILEC alternatives. In examining potential substitutes that may be available from the incumbent, the Commission should limit its inquiry to network elements that are offered on an unbundled basis. The Commission should not consider resale of the same element to be a reasonable substitute. Such a standard would eviscerate the 1996 Act’s “bright line” distinction between the resale and UNE methods of entry.

- Self-Provisioning. In its review of potential substitutes the Commission should take into account its rules omitting a facilities requirement for CLEC provision of service.<sup>32</sup> That rule was upheld by both the Eighth Circuit and the Supreme Court and allows CLECs to choose to do no self-provisioning at all. It would be anomalous to have that rule in place, while simultaneously requiring CLECs to self-provision a large number of elements.<sup>33</sup>
- Other Non-ILEC Sources. As required by the Supreme Court, NEXTLINK's "reasonable substitute" analysis contemplates, and in fact, focuses on the availability of alternatives from non-ILEC sources other than the requesting carrier. Unless the alternative offers comparable functionality, with no material decrease in quality, increase in cost, limitation in scope or delay in provisioning, unbundling of the proprietary ILEC network element will be necessary.

**2. The "Impair" Standard In Section 251(d)(2) Must Be Defined in a Way that Requires Unbundling in the Absence of a Fully Functioning, Competitive, Wholesale Market for a Network Element.**

The Supreme Court held that, in failing to consider alternative sources for network elements outside the ILECs' networks, and by regarding any increased cost or decreased service quality as meeting the standard, the Commission had failed to interpret reasonably the "impair" standard in Section 252(d)(2)(B).<sup>34</sup> On remand, the Commission is charged with giving substance to the impair standard. In so doing, the Commission's focus must remain on new entrants' ability to enter markets and compete in the absence of an unbundling requirement.

NEXTLINK submits that the Commission must determine whether a fully functioning, competitive, wholesale market exists for a requested network element. If a wholesale market for a network element has developed sufficiently, carriers can obtain interchangeable elements from sources other than the ILECs. Network elements should be considered interchangeable if their

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<sup>32</sup> First Local Competition Order, 11 FCC Rcd at 15666-71.

<sup>33</sup> Iowa Utils. Bd. v. FCC, at 816-17; AT&T v. Iowa Utils. Bd., at 736.

<sup>34</sup> AT&T v. Iowa Utils. Bd., at 734-36.

use imposes on requesting carriers no material decrease in quality, increase in cost, limitation of scope, or delay in bringing a competitive service offering to market.<sup>35</sup>

NEXTLINK supports the ALTS proposed definition for determining when a fully functioning wholesale market has developed and believes it remains true to the 1996 Act's goal of transitioning local service markets from a monopoly to a competitive paradigm. Unless a fully functioning wholesale market for a particular element has developed, ILEC unbundling will remain the only means by which CLECs can obtain ubiquitous access to critical network functionalities at rates that approximate cost. Without such access, network elements will cease to be an effective method of entry for local service competition.

As required by the Supreme Court, this standard incorporates a meaningful limiting standard and requires an examination of sources outside the ILECs' networks. By incorporating a materiality test into the impair standard, NEXTLINK proposes a limiting standard that is qualitative and not trivial.<sup>36</sup> Rather than focusing on the extremes represented by any decrease in quality or increase in cost or the availability of any substitute network element, NEXTLINK' proposal focuses on the availability of alternative network elements that are fully interchangeable.<sup>37</sup>

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<sup>35</sup> Remand NPRM at para. 25.

<sup>36</sup> NEXTLINK disagrees with any proposal that incorporates into the impair standard a quantitative aspect requiring a specific number of alternative wholesale vendors. Effective wholesale competition will require a number of network element vendors in a particular market and that the elements be practically available across the market.

<sup>37</sup> As demonstrated by its use of an example in which an entrant whose anticipated annual profits from a proposed service are reduced from 100 percent of investment to 99 percent, the Supreme Court rejected what it viewed to be an extreme reading of the impair test. AT&T v. Iowa Utils. Bd., at 735. This analysis, however, in no way suggests that the Commission should move to the other extreme characterized by those who may argue that the presence of any alternative network element vendor should serve to eliminate an ILEC's obligation to unbundle non-proprietary network elements. This opposite extreme would be satisfied, for instance, if one wholesale  
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As required by the Supreme Court, under this standard the Commission would consider sources outside the ILECs' networks.

- ILEC Alternatives. As indicated above, resale should not factor into the Commission's decisions on which network elements should be made available on an unbundled basis.
- Self-Provisioning and Other Non-ILEC Sources. A requesting carrier's ability to self-provision a network element may factor into the existence of a competitive wholesale market for the particular network element. Likewise, other CLECs and non-carrier service providers may offer network elements that should be considered in the Commission's assessment of the impair standard. Taken together, the availability of network elements from all non-ILEC sources may demonstrate the presence of a fully functioning, competitive wholesale market.

## II. APPLICATION OF THE NECESSARY AND IMPAIR STANDARDS.

Once the Commission adopts standards for Section 251(d)(2), it must determine which network elements ILECs must offer to CLECs. The Commission now also should refine its rules that define those network elements ILECs must offer and clarify that CLECs may obtain access to such elements at any technically feasible point.

In revisiting the definitions of network elements, the Commission should ensure that they reflect the practical experience of NEXTLINK and other carriers since the First Local Competition Order. This requires that the Commission review and incorporate in its rules, advances in technology as vendors and carriers introduce new advanced services and new equipment designed to support the network environment spurred by the entry of new competitors. As a facilities-based carrier, NEXTLINK has specific concerns regarding those network elements that NEXTLINK has had significant experience with during the last three

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provider existed, even if that provider could not satisfy demand on a timely basis, or across the region.

years: loops, transport, inside wire, network interface device (“NID”), SS7 signaling, call-related databases and operation support systems (“OSS”).<sup>38</sup> These network elements represent the essential connection between NEXTLINK’s network and the vast majority of potential customers that cannot otherwise directly connect to NEXTLINK’s network. NEXTLINK urges the Commission not only to mandate access to these elements, but to refine their definitions to address the many ways in which ILECs have sought to evade their unbundling duties over the past three years.

**A. The Commission Must Revisit Its Rules Governing Network Element Definitions and Access on an Unbundled Basis.**

The Commission must first identify the standards under Section 251(d)(2) for determining which network elements ILECs must provide. In order to promote the pro-competitive goals of the Act and to address the imbalance in bargaining power present between new entrants and entrenched incumbent LECs,<sup>39</sup> the Commission then should refine and strengthen its definitional rules for network elements and clarify that CLECs may obtain access to such elements at any technically feasible point.<sup>40</sup> The Supreme Court’s vacation of Rule 319 in no way diminishes the Commission’s authority to adopt rules that implement what is a network element and where the ILEC should provide access to it. Indeed, the Court’s only

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<sup>38</sup> In fact in many of its markets, (e.g., Columbus, Ohio, Nashville, Tennessee) NEXTLINK is the largest user of these unbundled network elements. As such NEXTLINK has spent enormous effort in working with incumbent LECs, state commissions and the Commission in order to improve (or even simply to obtain) ILECs’ provision of network elements.

<sup>39</sup> See First Local Competition Order, 11 FCC Rcd at 15570-71, 15624.

<sup>40</sup> 47 U.S.C. § 251(c)(3).

concern was that the Commission did not properly use the standards of Section 251(d)(2) in deciding which network elements an ILEC must provide to a requesting CLEC.<sup>41</sup>

Based on the additional information it will receive in the record,<sup>42</sup> the Commission should adopt explicit and detailed rules that help redress the continuing imbalance of bargaining power between CLECs and ILECs and further reduce the level of litigation that will result from CLEC requests for access to network elements.<sup>43</sup> In addition, by adopting rules refining the definitions of network elements, the Commission will provide guidance to state commissions in their roles as arbitrators under Sections 251 and 252.<sup>44</sup>

**1. Loops.**

**a. ILECs must Provide Loops Under the Section 251(d)(2) Standard.**

The Commission's "strong expectation" that incumbent LECs should be required to provide access to loops under Section 251(d)(2) is well founded.<sup>45</sup> Prior to the Commission's adoption of the First Local Competition Order, ILECs agreed that the provision of loops was

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<sup>41</sup> AT&T v. Iowa Utils. Bd. at 734-36.

<sup>42</sup> The Commission should also rely on and incorporate into this proceeding the record in the Advanced Services docket because it contains specific, detailed information regarding steps the Commission can take to ensure that network elements necessary for the deployment of advanced services are readily available to CLECs. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147. See also Comments of NEXTLINK Communications, Inc. in Deployment of Wireline Services Offering Advanced Telecommunications Capability (September 25, 1998).

<sup>43</sup> See e.g., First Local Competition Order, 11 FCC Rcd at 15528, 15624.

<sup>44</sup> As discussed above, state commissions may react to changing conditions or unique local issues by requiring ILECs to provide additional network elements, but state commissions should be barred from reducing an ILEC's obligation to provide necessary network elements.

<sup>45</sup> Remand NPRM at para. 32.

required by the Act.<sup>46</sup> NEXTLINK's experience since the adoption of that Order clearly demonstrates that access to loops is mandated by Section 251(d)(2).

As the Commission has previously concluded, there are no proprietary interests at stake in the provision of a loop by an ILEC to a requesting carrier.<sup>47</sup> Even where proprietary information conceivably might exist (e.g., in channel bank and remote terminal equipment), access to the loop need not reveal proprietary information to requesting carriers.<sup>48</sup>

The loop, a wireline connection between the network and the end-user, is the sin qua non of a bottleneck in the network of networks. The experience of new entrants, such as NEXTLINK, over the last three years overwhelmingly demonstrates the need to gain nondiscriminatory access to the loop, the "last mile" between competitor and customer, in order to provide a viable competitive alternative to existing ILEC services. New entrants have spent extraordinary resources deploying facilities, but even with the massive amount of investment made by CLECs, including NEXTLINK, CLEC networks still do not directly reach more than small fraction of the total number of customers.<sup>49</sup> Only the wireline loop in the ILEC network

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<sup>46</sup> Id. at para. 32, n. 27 (citing ILEC comments in Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98).

<sup>47</sup> First Local Competition Order, 11 FCC Rcd at 15694.

<sup>48</sup> Id.

<sup>49</sup> See e.g., NEXTLINK Comments in Petition of the Bell Atlantic Telephone Companies for Forbearance from Regulation as a Dominant Carrier in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; And Virginia, CC Docket No. 99-24 (3/17/99) at 5-8. For example, although NEXTLINK has deployed fiber optic facilities in several markets, only ILEC facilities serve an overwhelming percentage of the high capacity transport and loop customers, even in those markets where ILECs have petitioned the Commission for pricing flexibility. See e.g., Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA, filed February 5, 1999; Petition of the SBC Companies for Forbearance, filed December 7, 1998 ("SBC Omnibus Petition"); Petition of Bell Atlantic For Forbearance, filed January 20, 1999 ("Bell Atlantic Petition"); Petition of the U S West (continued...)



provides new entrants with the ability to provide competitive alternatives to the incumbent's service on a broad and immediate basis. Self-provisioning by CLECs themselves or obtaining access to loops from other carriers that are in the process of provisioning loops cannot provide CLECs with an adequate substitute for the broad-based competition envisioned under the Act.

As the Commission concluded in its First Local Competition Order:

Without access to unbundled local loops, new entrants would need to invest immediately in duplicative facilities in order to compete for customers. Such investment and building would likely delay market entry and postpone the benefits of local telephone competition for consumers.”<sup>50</sup>

Without access to the critical “last mile” provided by the loop, competitors such as NEXTLINK will be unable to provide a competitive alternative.

**b. Definition of Loop Network Element.**

In the First Local Competition Order, the Commission defined the loop as a “transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the network interface device at the customer premises.”<sup>51</sup> The Commission stated that competitors could request two-wire and four-wire loops, and loops conditioned to provide digital, higher bandwidth services, such as ISDN, ADSL, HDSL, and DS-1 level signals.<sup>52</sup> In addition, the Commission stated that ILECs must provide “cross-connect facilities”

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Companies For Forbearance, filed December 7, 1998 (“U S West Seattle Petition”); and Petition of the U S West Companies For Forbearance, filed August 24, 1998 (“U S West Phoenix Petition”).

<sup>50</sup> See Id., 11 FCC Rcd at 15690.

<sup>51</sup> First Local Competition Order, 11 FCC Rcd at 15691. See 47 C.F.R. § 51.319.

<sup>52</sup> First Local Competition Order, 11 FCC Rcd at 15691.

between a loop and a requesting carrier's collocated equipment to allow for the requesting carrier to gain access to the loop.<sup>53</sup>

The Commission indicated in the First Local Competition Order that it would periodically review and revise its rules regarding network elements.<sup>54</sup> The three years following the Act have been marked by a period of intense effort and investment by CLECs. They have also been marred by resistance and delay in the deployment of unbundled network elements by ILECs, and the costly and unnecessary litigation that has accompanied the ILECs' intransigence. It is, therefore, not enough for the Commission to simply reinstate its prior definitional rules for loops. The Commission should refine its network element definitions and strengthen the rules for access to the loop to allow the broadest flexibility of use for CLECs and to eliminate the ambiguities exploited by ILECs in the previous three years.

The Commission should make clear that regardless of underlying technologies or facilities, the loop is a single channel from an ILEC end office to a customer premises that must be made available to competitors. ILECs have tried to skirt the existing definition to avoid providing loops when integrated digital loop carrier ("IDLC") equipment or remote switching units are involved in the connection between the ILEC switch and the end-user.<sup>55</sup> The loop is ultimately the network element that provides a competing network with access to an end-user. The Commission, therefore, should carefully define the loop to ensure CLEC's access to the end-user through the use of a loop, regardless of the technology, current or future, that ILECs deploy in their networks.

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<sup>53</sup> Id., 11 FCC Rcd at 15693.

<sup>54</sup> See e.g., Id., 11 FCC Rcd at 15694.

<sup>55</sup> See Section III.A.1.c.1. infra (for further discussion of IDLC).

**1) Cross-Connects Must Be Included Within the Definition of Loops.**

The Commission also should make clear that cross-connects are part of the loop in order to ensure that requesting carriers are ensured nondiscriminatory access to loops. A cross-connect is an integral part of the loop and unquestionably necessary to provide nondiscriminatory access on just and reasonable terms and conditions as required by the Act. Despite the Commission's clear directive in the First Local Competition Order that cross-connects must be provided to CLECs to access the loop,<sup>56</sup> ILECs have not always provided cross-connects as needed or at a cost-based rate that allows use of the requested loops.<sup>57</sup> NEXTLINK has expended unnecessary time and expense litigating ILECs' obligation to provide cross-connect facilities as part of the unbundled loop.<sup>58</sup> The Commission, therefore, should make explicit to the ILECs what is obvious to the rest of the industry by stating explicitly that cross-connect facilities are part of the loop. The Commission should explicitly include cross-connect facilities in defining the loop element and prohibit ILECs from imposing additional charges for those facilities.

**2) Conditioned Loops Must Be Provided Upon Request.**

The Commission should clarify that CLECs may use loops for any telecommunications services that they seek to provide. Ultimately, many of the advanced services that CLECs seek to provide require higher bandwidth than existing voice grade (or DS-0) services. To ensure that

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<sup>56</sup> See First Local Competition Order 11 FCC Rcd at 15693-94. ("Incumbent LECs must provide cross-connect facilities, for example, between an unbundled loop and a requesting carrier's collocated equipment, in order to provide access to that loop.").

<sup>57</sup> For example, BellSouth has stated repeatedly to NEXTLINK that cross-connects are actually a separate network element. Petition of NEXTLINK TENNESSEE L.L.C. For Arbitration of an Interconnection Agreement With BellSouth Telecommunications, Inc., Arbitration Ruling, Docket No. 98-00123 (May 18, 1999) ("NEXTLINK Tennessee Arbitration Ruling") at 18-20.

<sup>58</sup> Id.

CLECs can compete in the growing advanced services market, CLECs must rely on loops capable of supporting higher-bandwidth services. As the Commission previously determined, CLECs should be able to use loops to provide digital services and high bandwidth services.<sup>59</sup>

The Commission, nonetheless must clarify that ILECs should perform all actions necessary to condition loops to provide the service desired by the requesting carrier.<sup>60</sup> Not only would such a revised definition support the Commission's findings in the Advanced Services Order and promote competition in the rapidly growing market for advanced services, it would provide significant clarity to CLEC rights in an area that otherwise would be rich for potential ILEC obfuscation.

The Commission has already proposed requiring the availability of "clean copper" loops in its Advanced Services proceeding.<sup>61</sup> The provision of clean copper loops should be part of the provision of unbundled loops at TELRIC prices. Furthermore, the Commission should recognize that conditioning loops in order to support the desired CLEC service is a functionality inherent in the element and captured in the TELRIC prices. Loop conditioning is not an additional service the ILEC can charge for at above-cost rates or otherwise refuse to provide on a nondiscriminatory basis. Conditioned loops are often difficult for CLECs to obtain today, reflecting the ILECs refusal to provide higher bandwidth loops on a nondiscriminatory basis. Moreover, the current confusion over this issue is reflected in the variety of rate schemes

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<sup>59</sup> See First Local Competition Order, 11 FCC Rcd at 15691-92.

<sup>60</sup> Conditioning involves removing bridge taps, loading coils and other electronic impediments on existing lines. See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011 (1998) ("Advanced Services MO&O") at 24037; First Local Competition Order, 11 FCC Rcd at 15692.

<sup>61</sup> See Advanced Services MO&O, 13 FCC Rcd at 24036-37.

associated with conditioned loops in different states. The Commission, therefore, should incorporate into the definition of a loop that loops must be capable of supporting desired CLEC services and that ILECs cannot block CLEC provision of innovative competitive services by failing to adequately condition the existing facilities.<sup>62</sup>

**3) High-Capacity Loops Must Be Included Within the Definition of Loops.**

The Commission has previously found that ILECs must provide a loop comprised of various underlying facilities in order to create a channel between the end office and the end-user. The Commission should further require that loops must be provided via two-wire, four-wire, fiber optics or other facilities present in the ILEC network.

Such a rule is necessary to ensure that CLECs receive access to the high capacity loops necessary to provide adequate bandwidth to their customers. CLECs should be able to request loop facilities at the DS1, DS3, and OC3, 12, and 48 level, as well as new loop capacities that are created as advances in loop technology arise.<sup>63</sup> In addition, as advanced technologies allow higher bandwidth to be provided over electrical facilities and ILECs deploy additional fiber in their networks, CLECs should be able to access there facilities to provide a competitive service.

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<sup>62</sup> For many services, the standards for conditioning the loop should reflect industry and vendor specific terms and conditions. Where such conditions are not readily available, the ILEC should be required to work with the CLEC, in order for the CLEC to inform the ILEC of the conditioning necessary to support the desired telecommunications service.

<sup>63</sup> Although NEXTLINK refers specifically to DS1, DS3, OC3, 12 and 48 services, ILECs should be required to unbundle all electrical and fiber optic loop facilities, including future advances in technology and facilities. While NEXTLINK has obtained high capacity loops from at least one ILEC there is significant disparity among incumbents across the country in their willingness to agree to unbundle high capacity loops. See Local Interconnection Agreement Between Pacific Bell and NEXTLINK, Amendment No. 3 (March 31, 1998) (providing for Pacific Bell provision of 4-Wire Digital Links).

It is also important that the Commission clarify that ILECs may not impose unnecessary non-recurring charges if CLECs move current access arrangements to unbundled loops. Most ILECs' access charge tariffs do not provide cost-based rates. If all that is involved in transitioning access services to the use of a network element is a change in billing records, CLECs should not have to pay ILECs non-recurring charges for work the ILEC will not actually perform.

At a minimum, the Commission should affirm the conclusions reached in the Advanced Services MO&O that Sections 251 and 252 apply equally to traditional voice services and higher bandwidth advanced services, including packet-based services.<sup>64</sup> It would be contrary to Congressional and Commission intent for CLECs to be able to access network elements only to compete for lower bandwidth services.

**4) Dark Fiber Loops Must Be Included Within the Definition of Loops.**

The Commission should clarify that dark fiber deployed from the end office to an end-user location can be requested as a loop.<sup>65</sup> As ILECs deploy extensive fiber facilities to end-user locations, such as multi-tenant buildings, CLECs should have access to "dark fiber" loops that are not otherwise lit by the ILEC. These facilities are no different than ordinary loops except that they require the CLEC to provide additional electronics equipment in order to provide service to the end-user. The application of Section 251(d)(2) is no different as well. Denial of access to dark fiber in loops would otherwise preclude the entry of competitors until they were

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<sup>64</sup> See e.g., Advanced Services MO&O, 13 FCC Rcd at 24036-37.

<sup>65</sup> Dark fiber loops are optical fiber connections deployed from an ILEC office or point of presence to an end-user premises, without electronic equipment in place necessary to send traffic over the facility. CLECs requesting dark fiber loops would deploy their own electronic equipment in order to use the loop to provide telecommunications services.

able to deploy extensive fiber facilities to match the extraordinary amount of fiber that ILECs have deployed over the last decade and a half.<sup>66</sup>

**c. Access to Loops Under Section 251(c)(3).**

In exercising its authority to define network elements the Commission needs to accomplish two goals. First, it needs to redress the failure of ILECs to provide access to loops that represent advances in technology or network engineering by explicitly delineating the types of loops that must be available. Second it must define network elements sufficiently broadly to capture future changes in technology and network engineering.

**1) Loops Provisioned by Digital Loop Carrier Systems.**

NEXTLINK and other CLECs have encountered significant technical issues in obtaining access to loops deployed in part through integrated digital loop carrier ("IDLC") facilities.<sup>67</sup> IDLC-deployed loops are often used to serve remote locations, or locations that are significantly far from the central office that the loop length presents problems for service quality.<sup>68</sup> IDLC also is often used to serve new locations where new facilities are required to be built.<sup>69</sup> If IDLC is deployed, several individual loops will terminate at a point between the end-user location and the serving central office. This "in-between" point houses a connection commonly referred to as a

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<sup>66</sup> See e.g., Fiber Deployment Update, End of Year 1997 Federal Communications Commission, Common Carrier Bureau, Industrial Analysis Division (1998).

<sup>67</sup> NEXTLINK has also encountered similar issues when remote switching units are deployed in ILEC networks. See Section III.A.1.c.3. infra (discussion of remote switching units).

<sup>68</sup> See Petition of NEXTLINK Pennsylvania, L.L.P. for Arbitration of an Interconnection Agreement with Bell Atlantic-PA, Inc., Pursuant to the Telecommunications Act of 1996, A-310260F0002, Hearing Transcript (April 23, 1998) ("NEXTLINK-PA Arbitration Hearing Transcript") at 301 ("I would guess that it's in newer areas where new business parks are springing up and possibly in areas that are further away from the central office rather than closer where you might be able to deliver [services] directly on copper cable."). See generally, Advanced Services MO&O, 13 FCC Rcd at 24110, Appendix C.

<sup>69</sup> NEXTLINK-PA Arbitration Hearing Transcript at 301.

feeder distribution interface (“FDI”). The traffic from individual loops in turn is transferred to the IDLC facility for transport from the FDI to the central office.

NEXTLINK has encountered continuous difficulties in obtaining nondiscriminatory access to loops that utilize IDLC.<sup>70</sup> The Commission’s current rules requiring access to the loop in the central office have served to prevent CLEC access to loops when IDLC facilities are present because many forms of IDLC equipment afford no access to that loop in the central office.<sup>71</sup> In the First Local Competition Order, the Commission acknowledged the difficulties presented by the presence of IDLC technology but only generally affirmed the right of CLECs to obtain nondiscriminatory access to the loop, even where the ILEC deploys IDLC systems.<sup>72</sup> CLECs and ILECs, however, had minimal experience with access to unbundled loops at that time.<sup>73</sup> Therefore, even though the Commission affirmed the right of CLECs to gain nondiscriminatory access to loops no matter what facilities the ILEC deployed in those loops, the Commission did not have an adequate record at that time to develop more precise rules regarding how ILECs should provide CLECs with nondiscriminatory access to loops using an IDLC system.

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<sup>70</sup> See NEXTLINK-PA Arbitration Hearing Transcript at 299. (“The bottom line is that we’re looking for circuits that are equal in quality. Equal in quality to what the customer use to experience when they were on Bell. Our feeling is that moving over to abandoned metallic plant represents a step backward. And that moving [from IDLC] to universal digital loop carrier is fraught with problems at the time of the cutover.”).

<sup>71</sup> Even though some types of IDLC support access to the loop in the central office, ILECs have resisted CLECs efforts to use that access. NEXTLINK-PA Arbitration Hearing Transcript at 303-304.

<sup>72</sup> First Local Competition Order, 11 FCC Rcd at 15692-93.

<sup>73</sup> Id., 11 FCC Rcd at 15684.



ILECs have generally offered NEXTLINK only the use of a spare copper loop when NEXTLINK seeks to serve an existing ILEC customer on an IDLC system.<sup>74</sup> This practice is inherently discriminatory. First, the ILEC is not offering NEXTLINK access to the same loop it uses to provide service to that customer. The use of an existing spare copper loop may meet minimal specifications to provide POTS service, but in most circumstances it cannot be used by the CLEC to provide the customer with service at parity with the ILEC's offering.<sup>75</sup> This is particularly evident where the customer is located at a significant distance from the nearest central office.<sup>76</sup> Further, the gap in service quality between a spare copper loop and an IDLC-deployed loop is even more dramatic when the CLEC attempts to utilize the loop to provide a higher bandwidth service, such as an xDSL service. Most advanced services require a shorter loop distance than is used for traditional voice service in order to maintain an adequate level of transmission quality. In this circumstance, the spare copper loop is not only discriminatory, it is an unworkable option to provide these services to the consumer. Neither Congress nor the Commission intended that ILECs' deployment of new digital technology, such as IDLC, would hold consumers hostage to the ILEC.

The Commission, therefore, should reaffirm the ILECs obligation to provide CLECs with nondiscriminatory access to the loop regardless of what facilities the ILEC deploys in its network. ILECs should be required to provide CLECs with access to IDLC-deployed loops at

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<sup>74</sup> Where ILECs do not have a spare copper loop available, ILECs have sought to impose special construction charges on CLECs for the construction on a new copper loop. Special construction charges can run into thousands of dollars and delays of several months. Loops provided through the special construction process cannot meet the ILEC's obligation to provide nondiscriminatory access to the loop.

<sup>75</sup> See NEXTLINK-PA Arbitration Hearing Transcript at 301.

<sup>76</sup> Id.

all technically feasible points. In many instances, dependent on the IDLC equipment deployed, CLECs should be able to request access to an IDLC-deployed loop at the digital side of the IDLC technology in the central office or at the point in the field where the IDLC feeder is connected to individual copper loops. As carriers deploy IDLC, and Universal Digital Loop Carrier (“UDLC”), and as they begin to deploy Next Generation Digital Loop Carrier technologies in their networks, the Commission must reaffirm the right of CLECs to gain nondiscriminatory access to the loop for the provision of all services, not just lower bandwidth voice services. The Commission therefore, should require ILECs, where they have deployed IDLC or similar digital loop facilities, to provide CLECs with access to that loop facility at any technically feasible point requested by the CLEC. If no such point exists, ILECs should provide access to a loop facility that the CLEC can combine with its own facilities or other network elements to provide its desired service to the end-user.

It is also important that these principles not be limited in application to IDLC. As ILECs use other or new technology in their networks, it is even more vital to competition that the Commission require broadly that all forms of loop technology be made available to CLECs on a nondiscriminatory basis.

## **2) Extended Loops.**

Access to a loop through the use of transport, often referred to as an “extended loop” is an extension of a loop over a dedicated interoffice transmission channel.<sup>77</sup> Extended loops promote competition in the local telecommunications market by increasing the number of end-users a facilities-based competitor can reach with a competitive alternative service. NEXTLINK

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<sup>77</sup> The extended loop may also require the use of multiplexing or aggregation functionality.

has obtained the right to use loops in this manner in some states, but only after protracted litigation and not in all instances subject to reasonable conditions or cost-based rates.<sup>78</sup>

There is no question that the provision of an extended loop is a technically feasible arrangement that can be provided by ILECs.<sup>79</sup> Furthermore, the only requirements for where and how to provide access to a network element are to be found in Section 251(c)(3) which provides that the ILEC must provide access “at any technically feasible point.” As the loop can be provided on an “extended” basis from another central office, the Commission should require that ILECs provision the extended loops upon CLEC request.

Although NEXTLINK urges the Commission to define the extended loop as a means of accessing the loop itself, NEXTLINK would support the alternative approach of requiring ILECs to provide a “combination” of transport and loop that provided the same functionality as NEXTLINK has discussed above.<sup>80</sup>

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<sup>78</sup> See e.g., Proceeding on Motion of the Commission to Examine Issues Related to the Continuing Provision of Universal Service and to Develop a Regulatory Framework for the Transition to Competition in the Local Exchange Market, Case 94-C-0095, et. al., Order Declaring Resale Prohibitions Void and Establishing Tariff Terms (June 25, 1996) (The New York Public Service Commission specifically directed Bell Atlantic (then NYNEX) to file tariffs to provide extended loops); Interconnection Agreement Under Sections 251 and 252 of the Telecommunications Act of 1996 between New York Telephone Company d/b/a NYNEX and NEXTLINK New York, L.L.C., October 20, 1997, at § 9.1.5 (“NEXTLINK New York Agreement”). The Pennsylvania Public Utility Commission and the Utah Public Service Commission have also ordered Bell Atlantic and U S WEST respectively to provide extended loops to NEXTLINK after protracted arbitration proceedings. NEXTLINK Pennsylvania Arbitration Final Order; NEXTLINK Utah Arbitration Award. Bell Atlantic, in fact, continues to dispute its obligation to provide NEXTLINK with access to extended loops. See Bell Atlantic Pennsylvania, Inc., v. NEXTLINK Pennsylvania L.L.P.; Pennsylvania Public Utility Commission; and John M. Quain, Robert K. Bloom, David W. Rolka, Nora Mead Brownell and Aaron Wilson, Jr., in their official capacities as Commissioners of the Pennsylvania Public Utility Commission, Complaint for Declaratory and Injunctive Relief Under the Telecommunications Act of 1996, 99-cv-494 (January 29, 1999).

<sup>79</sup> See NEXTLINK Utah Arbitration Award; NEXTLINK Pennsylvania Arbitration Final Order.

<sup>80</sup> See Section III.B.3.a. infra (discussion of combination of loop and transport).

**3) Loops Provisioned By Remote Switching Units.**

When an ILEC has deployed a remote switching unit to serve certain customers, the ILEC should not be permitted to require that CLECs access the unbundled loop by collocation at the remote switching location, which is not required by Commission rules and often is not even feasible.<sup>81</sup> It is the ILEC's decision to deploy a particular loop technology, whether that is a single copper loop, a combination of copper and fiber, or loops passing through a remote switch. Allowing the ILEC to dictate the point of access, such as at a remote switching unit, will inevitably result in ILEC efforts to drive up CLEC costs and shield consumers from competition. ILECs should not be permitted to evade their obligations to provide access to loops via the type of technology they deploy in their networks.

Not surprisingly, some ILECs have been remarkably agile in their use of Commission rules to deny NEXTLINK access to network elements where remote switches are involved. Most ILECs initially took a firm position against what they deemed to be "sub-loop" unbundling.<sup>82</sup> For example, NEXTLINK initially obtained access to BellSouth's loops provisioned through remote switching units through collocation in the central office.<sup>83</sup> However, as NEXTLINK sought to compete with BellSouth in more areas served with loops provisioned via remote switching units, BellSouth, began to require NEXTLINK to collocate at remote

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<sup>81</sup> See Petition of NEXTLINK Tennessee L.L.C. for Arbitration of Interconnection with BellSouth Telecommunications, Inc., Rebuttal Testimony of Russell Land on behalf of NEXTLINK Tennessee, L.L.C., Docket No. 98-00123 at 45.

<sup>82</sup> See First Local Competition Order, 11 FCC Rcd at 15687-89.

<sup>83</sup> Petition of NEXTLINK TENNESSEE L.L.C. For Arbitration of an Interconnection Agreement With BellSouth Telecommunications, Inc., Direct Testimony of Russell Land on behalf of NEXTLINK Tennessee, L.L.C., Docket No. 98-00123 at 26-32.

switching units in order to gain access to those loops.<sup>84</sup> BellSouth's collocation requirement, as BellSouth well knew, deterred NEXTLINK from competing for those customers by imposing a more onerous, costly collocation requirement.

The Commission, therefore, should clarify that ILECs must provide CLECs with nondiscriminatory access to loops provisioned in part through remote switching facilities and that CLECs may obtain access to those loops at any technically feasible point, including at the host switch or the remote switching unit itself, at the option of the requesting CLEC.

#### **4) Sub-loop or Intra-Loop Access.**

The Commission will undoubtedly face new requests for "sub-loop" unbundling. NEXTLINK submits that the history of sub-loop unbundling reflects a fundamental misconception of CLECs' requests for access to the loop and unnecessarily complicates what is in reality a straightforward, pro-competitive request. First of all, if the loop is properly defined as the facility providing a connection between the competitor's network and the end-user, in almost every situation where the CLEC requests "sub-loop" unbundling, the CLEC actually is requesting access to a loop, *i.e.*, a facility that will provide the CLEC with a connection between its network and the end-user. It is still the loop that is at issue, and the ILEC must still provide the loop as a necessary network element under the same Section 251(d)(2) analysis. The only

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<sup>84</sup> See NEXTLINK Tennessee Arbitration Order at 27-29. The Tennessee Regulatory Authority agreed with BellSouth that NEXTLINK must obtain access to loops at the remote switching unit (The TRA also agreed with BellSouth that the presence of the remote switching unit made access to the loop a combination). *Id.* Finally, the TRA decided it was not necessary for NEXTLINK to collocate in the remote switching unit to combine the "loop" (the copper facility terminating at the remote switching unit location) and the "transport" (the digital facility carrying multiplexed traffic from the remote switching unit to the switch at the central office) but that it could not perform the "combining" itself and would need to hire a third party vendor in order to do so. *Id.* Needless to say, this will raise NEXTLINK's costs, thus impairing NEXTLINK's ability to compete for BellSouth customers served presently via loops provisioned through remote switching units.

question then becomes, is the point of access requested by the CLEC “technically feasible.” If it is, then the ILEC must allow the CLEC access at that point in order for the CLEC to provide the desired telecommunications service to the end-user.

## **2. Interoffice Transport.**

The ubiquitous nature of ILEC transport remains critical to the development of local competition and to the UNE entry method in particular. At this early stage of local competition, a competitive wholesale market for transport facilities has not developed and unbundling remains an essential component of the infrastructure of local competition.

### **a. ILECS Must Provide Transport Under the Section 251(d)(2) Standard.**

Interoffice transport is a non-proprietary network element that qualifies for unbundling under the “impair” test of Section 251(d)(2)(B). In its First Local Competition Order, the Commission determined that interoffice transport was not “proprietary.”<sup>85</sup> The Commission should continue to conclude that interoffice transport unbundling does not involve the disclosure of competitively-sensitive information or processes protected by intellectual property laws.

In the First Local Competition Order, the Commission concluded that unbundled transport would “increase the speed with which competitors enter the market;”<sup>86</sup> “decrease the cost of entry compared to the much higher cost that would be incurred by an entrant that had to construct all of its own facilities;”<sup>87</sup> and “improve competitors’ ability to design efficient network architecture, and in particular, to combine their own switching functionality with the

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<sup>85</sup> See First Local Competition Order, 11 FCC Rcd at 15720 (“Commenters do not identify any proprietary concerns relating to the provision of interoffice facilities that LECs are required to unbundle.”).

<sup>86</sup> Id. at 15718-19.

incumbent LEC's unbundled loops.”<sup>88</sup> The environment for transport has not significantly changed in the last three years.

ILECs continue to possess the only widely-deployed transport facilities, and without access to those facilities, CLECs' ability to compete would be significantly delayed and the costs of market entry would be greatly increased. There simply are not readily available third-party wholesale transport facilities. CLECs, therefore, are left with the option of self-provisioning every individual facility deployed.<sup>89</sup> Even if CLECs incur the time and expense of self-provisioning for the foreseeable future, they will not be able to duplicate the extensive facilities deployed by ILECs.

In its First Local Competition Order, the Commission noted that “there are alternative suppliers of interoffice facilities in certain areas.”<sup>90</sup> Then, as now, an efficient wholesale market for interoffice transport simply has not developed. In fact, even where self-provisioned facilities have been built, it has been on a limited number of routes in very dense urban areas.<sup>91</sup> A

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<sup>87</sup> Id.

<sup>88</sup> Id. at 15720-21 (finding that interoffice transport meets the “impair” test, as then defined by the Commission.).

<sup>89</sup> In addition, CLECs have no option to self-provision prior to obtaining franchise authority and authority to access public rights-of-way. In some cases, the franchise process can cause lengthy delays in the time it takes for a CLEC to enter the market. Often the only alternative available to enter a market before franchise approval is secured is leased transport from the ILEC.

<sup>90</sup> Id. at 15718-19.

<sup>91</sup> See e.g., NEXTLINK Comments in Petition of the Bell Atlantic Telephone Companies for Forbearance from Regulation as a Dominant Carrier in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; And Virginia, CC Docket No. 99-24 (March 17, 1999) at 5-8. In comments in the Commission's Access Charge Reform proceeding, CC Docket No. 96-262, NEXTLINK and other CLECs have demonstrated that, in the three years since the 1996 Act, although competitors have made significant investment in alternative facilities, currently only ILEC facilities exist to serve the overwhelming majority of customers.

wholesale market for transport is still years away, even in those areas where CLECs have initially invested in facilities. Moreover, there is simply no evidence that these self-provisioned facilities have been made available on a wholesale basis to other carriers. For most customers and locations, ILEC unbundled transport is the only available option.<sup>92</sup>

**b. Definition of Transport Network Element.**

As well as ordering transport unbundling, the Commission must clarify that transport must be available both between ILEC offices, and between an ILEC office and a CLEC point of presence. The Commission must define the transport elements so that ILECs must provide the essential function of transport – the transmission of traffic between ILEC offices, and ILEC and CLEC offices – regardless of the technology or facilities deployed in their networks.

**1) The Commission Should Affirm that Its Existing Interoffice Transport Definition Requires ILECs to Provide Unbundled Access to “Entrance Facilities” and High Capacity Transport.**

In its First Local Competition Order, the Commission concluded that:

[I]ncumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between those offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWCs), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandems of the incumbent LEC, and the wire centers of incumbent LECs and requesting carriers.<sup>93</sup>

NEXTLINK supports this conclusion and requests that the Commission explicitly reaffirm its findings in its order on remand. Consistent with the language above and to facilitate connectivity between ILEC and CLEC networks, the Commission should clarify that unbundled

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<sup>92</sup> Id.

<sup>93</sup> First Local Competition Order, 11 FCC Rcd at 15718.



interoffice transport must be made available between ILEC offices and between an ILEC office and a CLEC point of presence. This clarification is necessary to prevent litigation and delay and to curb efforts by ILECs to charge non-TELRIC-based rates for “entrance facilities” between their own offices and a CLEC’s point of presence.

NEXTLINK also requests that the Commission explicitly affirm another of its First Local Competition Order conclusions with respect to unbundled transport. There, the Commission found that ILECs must provide unbundled access to “all technically feasible transmission capabilities, such as DS1, DS3, and Optical Carrier services.”<sup>94</sup> An explicit affirmation of this conclusion is necessary because, despite this language, most ILECs have resisted giving CLECs access to high speed transport. High speed transport is non-proprietary in nature and qualifies for unbundling under the impair test, because requesting carriers’ ability to compete will be materially diminished without it. Moreover, high speed transport is essential to bringing broadband innovations to the marketplace. Unbundling high speed transport, therefore, is not only consistent with the impair standard, but also with the public interest and the promotion of advanced services under Section 706.

**2) The Commission Should Clarify that Multiplexing is Part of the Transport Element.**

NEXTLINK has encountered ILEC resistance to providing multiplexing functionality as part of the transport element as required by the Commission.<sup>95</sup> Although, the Commission’s

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<sup>94</sup> Id.

<sup>95</sup> See NEXTLINK Tennessee Arbitration Ruling. The Tennessee Regulatory Authority (“TRA”) accepted BellSouth’s argument that transport and DCS functionality are two separate network elements that BellSouth does not have to provide in combination. The TRA further concluded that to the extent that BellSouth is willing to “combine transport and DCS for NEXTLINK, the parties should negotiate the charge that would apply to such combinations, with  
(continued...)

current definition of transport includes functionality provided by the incumbent LEC's digital cross-connect ("DCS") systems,<sup>96</sup> NEXTLINK has encountered difficulty in obtaining that functionality from some ILECs.<sup>97</sup> For example, BellSouth has refused to provide DCS as part of unbundled transport, claiming that BellSouth does not have to provide DCS functionality in offices where NEXTLINK is not collocated.<sup>98</sup>

The Commission should clarify that DCS functionality is part of the transport network element that ILECs must provide to competitors. This is only logical as DCS, on its own, does not provide the function of carrying traffic from one office to another or between an ILEC office and NEXTLINK. The sine qua non of interoffice transmission is transport between offices – DCS does not and cannot accomplish that function without other transport links on either side. The refusal of some ILECs to provide multiplexing functionality with transport is no different than the refusal of some ILECs to provide a cross-connect with an unbundled loop. This is clearly anti-competitive. NEXTLINK should be able to obtain needed DCS functionality as part of the transport network element.

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the combinations and charges not being subject to the requirements of the 1996 Act." Id. at 9 (emphasis added).

<sup>96</sup> 47 C.F.R. § 51.319(d)(2)(iv). See First Local Competition Order, 11 FCC Rcd at 15712-20.

<sup>97</sup> See e.g., NEXTLINK Tennessee Arbitration Ruling.

<sup>98</sup> NEXTLINK Tennessee Arbitration Ruling at 4-5. "BellSouth argues that NEXTLINK can obtain access to the routing capabilities provided by DCS without collocating by purchasing BellSouth's FlexServ offering. This retail service allows NEXTLINK to establish a link from a remote location to the control center in order to manage its own facilities through DCS with collocating." Id. The "FlexServ" offering from BellSouth, not surprisingly, is not offered at TELRIC rates.

**3. Inside Wire.**

NEXTLINK agrees with the Commission's concern that inside wire owned or controlled by ILECs can preclude CLECs from providing service to some customers, particularly those in multi-unit locations, and may need to be provided as a network element under Section 251(d)(2). In any situation where the ILEC controls or owns inside wire (i.e., wire that is located on the end-user side of the demarcation point), the ability of the CLEC to provide service to the end-user through access to an ILEC loop is cast into doubt because of the uncertain status of that inside wire.

Under the Commission's rules it is not clear that inside wire, including riser cable in buildings, can be considered as part of the loop, or can otherwise be defined as a separate network element that the ILEC must provide. The Commission has requested comment on "situations where the incumbent LEC owns facilities on the end-user's side of the network demarcation point and whether those facilities should be unbundled under Section 251(c)(3)."<sup>99</sup> The percentage of end-users who receive service in multi-unit buildings (both business and residential) is significant. As a result, the Commission should address the issue of how CLECs may provide service to these end-users using the same Section 251(d)(2) analysis that it employs for the network elements previously defined by the Commission in the First Local Competition Order.

**a. ILECs Must Provide Inside Wire Under the Section 251(d)(2) Standard.**

NEXTLINK is not aware of any claim made by ILECs over the last three years that inside wire raises proprietary issues. If ILECs make claims to the contrary in this proceeding,

NEXTLINK will address those claims in its reply comments. In any event, as the experience of the last three years has proven, access to inside wire in multi-unit buildings is absolutely necessary to provide services in those buildings. It is almost impossible to do so without access to the existing inside wire. Perhaps, even more costly, time consuming and unnecessary than the deployment of new loop facilities in the public rights-of-way, rewiring a building involves an expenditure of resources that delay and impair competition between CLECs and ILECs. CLECs and potential customers within multi-unit buildings have suffered discriminatory treatment from owners of inside wire, both ILECs and landlords. ILECs and landlords have proposed astronomical charges for CLEC access to inside wire, well above any reasonable cost-based rate. In this proceeding, the Commission can directly address inside wire owned or controlled by ILECs. The Commission, therefore, should define inside wire owned or controlled by ILECs as a network element and require ILECs to provide CLECs with nondiscriminatory access at cost-based rates.

#### **4. Network Interface Device (“NID”).**

NEXTLINK believes that NIDs, although part of the loop, should also be made available as a distinct network element. The NID, just like the loop and inside wire, is a potential bottleneck to providing service to customers.

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<sup>99</sup> Remand NPRM at para. 33.

**a. ILECs Must Continue to Provide the NID Under the Section 251(d)(2) Standard.**

Like the local loop, the NID is a nonproprietary network element that qualifies for unbundling under the impair test of Section 251(d)(2)(B).<sup>100</sup> The NID is located at individual customer premises making the availability of existing alternative supply extremely unlikely. Self-provisioning, although possible, often is not a viable alternative for economic and building access reasons. For example, in many instances due to space limitations or the refusal of landlords to grant permission to CLECs, it is simply not possible to self-provision another NID. In the same manner that CLECs cannot duplicate the ubiquitous deployment of ILEC loops, CLECs are unable to match the scope and scale of existing deployed ILEC NIDs. The Commission, therefore, should require ILECs to make the NID available to CLECs as a UNE.

**5. Signaling Systems and Call-Related Databases.**

As the Commission recognized in its First Local Competition Order, nondiscriminatory access to signaling networks and call related databases is essential to the effective interconnection of ILEC and CLEC networks.<sup>101</sup>

**a. ILECs Must Continue to Provide the SS7 Signaling and Call-Related Databases Under the Section 251(d)(2) Standard.**

The Commission previously found that SS7 signaling and access to call-related databases are based on Bellcore standards and are therefore nonproprietary.<sup>102</sup> The Commission should

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<sup>100</sup> First Local Competition Order, 11 FCC Rcd at 15697 (“we conclude that the unavailability of access to incumbent LECs’ NIDs would impair the ability of carriers deploying their own loops to provide service.”). Although, NEXTLINK contends that unbundled access to NIDs is necessary, NEXTLINK seeks to clarify that the NID is also appropriately a part of an unbundled loop. The Commission should clearly state so in its rules to avoid potential for ILEC abuse.

<sup>101</sup> First Local Competition Order, 11 FCC Rcd at 15738. (recognizing that such access is required under Section 251(c)(2)).

<sup>102</sup> Id. at 15739-40, 15744.

continue to find SS7 signaling and access to call related databases nonproprietary because both can be provided on an unbundled basis without revealing proprietary information. Access to Service Management Systems (“SMS”) also should be nonproprietary because unbundled access does not reveal proprietary processes or methods.<sup>103</sup> Thus, unbundled access to SS7 signaling, call-related databases and the SMS needed to effectively use call-related databases should be evaluated under the “impair” standard in Section 251(d)(2)(A).<sup>104</sup>

Over the past three years, no comparable alternatives have developed for ILEC signaling or call databases. With respect to call-related databases, there simply are no substitutes. Thus, with respect to SS7 signaling, call-related databases, and SMS, it is clear that competitors’ ability to compete would be materially diminished in the absence of an unbundling requirement.

#### **6. Operations Support Systems.**

Access to Operations Support Systems (“OSS”) functions is a critical network element that is necessary for access to all other network elements. The Commission and numerous state commissions have confirmed the importance of access to OSS functions as a prerequisite to nondiscriminatory access to network elements and resale. The Commission’s conclusions in the First Local Competition Order to require ILECs to provide access to OSS functions are just as valid now as they were three years ago.

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<sup>103</sup> Id. at 15749.

<sup>104</sup> In the First Local Competition Order, the Commission concluded that signaling, call-related databases and SMS each met the “impair” test, as then defined by the Commission. Id. at 15740, 15745 and 15749.

**a. ILECs Must Continue to Provide the OSS Under the Section 251(d)(2) Standard.**

Under the standard proposed by NEXTLINK, OSS does not qualify as “proprietary,” for the purposes of Section 251(d)(2). Although some ILECs have developed what they claim to be proprietary interfaces, unbundled access to those interfaces does not reveal any proprietary aspect subject to protection under the nation’s intellectual property laws. Thus, NEXTLINK submits that OSS unbundling must be evaluated under the “impair” test.<sup>105</sup>

There can be no question that a requesting carrier’s ability to compete would be diminished materially without unbundled access to OSS. The Commission’s First Local Competition Order conclusions regarding the importance of unbundled access to OSS have been affirmed by the Commission repeatedly in its orders over the past three years. Specifically, the Commission found that:

Without access to review, inter alia, available telephone numbers, service interval information, and maintenance histories, competing carriers would operate at a significant disadvantage to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier’s ability to provision and offer competing services to incumbent LEC customers. Finally if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that the incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support system functions, which would include access to the

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<sup>105</sup> In its first application of the Section 251(d)(2) standard, the Commission applied both the “necessary” and “impair” tests and concluded that unbundled access to OSS was “essential.” Although different standards must be applied on remand, the Commission’s original conclusion aptly suggests that OSS unbundling is required under any possible interpretation of the Section 251(d)(2) standards. Id. at 15766.

information such systems contain, is vital to creating opportunities for meaningful competition.<sup>106</sup>

The impair standard is more than satisfied. ILECs' OSS cannot be replaced by self-provisioning or by alternative vendors. For local competition to take hold and to ensure that UNE-based entry remains viable, the Commission must retain its OSS unbundling requirement.

**B. The Commission Must Clarify that Combinations of Certain Network Elements Are Mandated by the Necessary and Impair Standards.**

Section 251(c)(3) provides that “[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide [a] telecommunications service.”<sup>107</sup> In the First Local Competition Order, and in subsequent orders rejecting Section 271 applications, the Commission has stated that Section 251(c)(3) means what it states: competitors must have access to combinations of network elements in order to provide desired telecommunications services.<sup>108</sup> In AT&T v. Iowa Utils. Bd., the Supreme Court upheld the Commission’s rules requiring the provision of combination of network elements.<sup>109</sup> The Commission should reaffirm that CLECs may request required network elements in combination without restriction. NEXTLINK, therefore, urges the Commission to re-promulgate Rules 315(c) – (f) and require ILECs to provision UNEs as requested by CLECs. In addition, NEXTLINK requests that the Commission require incumbent

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<sup>106</sup> Id. at 15763-64.

<sup>107</sup> 47 U.S.C. § 251(c)(3).

<sup>108</sup> See e.g., First Local Competition Order, 11 FCC Rcd at 15647-48; Application of BellSouth Corporation Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, Memorandum Opinion and Order, 13 FCC Rcd 539 (1997) at 646-56.

<sup>109</sup> AT&T v. Iowa Utils. Bd. at 736-38.



LECs to provide certain minimum combinations in order to avoid further delay and litigation and to speed the development of competition.

The Supreme Court's reinstatement of Rule 315(b) makes it clear that an ILEC must make available to competitors on a cost-based, unbundled basis combinations of UNEs used by the ILEC in provisioning services to its own carrier and end-user customers.<sup>110</sup> As the Commission explained in its First Local Competition Order, "incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined."<sup>111</sup> The Commission should reaffirm this conclusion here to curtail the ability of ILECs to employ overly technical readings of the rule in an effort to end-run their newly reinstated obligation to provide combinations of network elements.

NEXTLINK urges the Commission to clarify that ILECs cannot avoid their obligation to provide network elements in combination simply because the requested facilities and functionalities have not been deployed in combination to a specific end-user before. Such an interpretation of the combination rules is clearly anti-competitive and in conflict with the Commission's more general rules on nondiscrimination and access to network elements. The Commission's rules require ILECs to provide CLECs with access to network elements (and combinations of network elements) that is equal to what the ILEC provides to itself, its affiliates or its end-users. The Commission's rules also recognize that the ILEC's network was not originally designed to provide CLECs with access to network elements and that the ILEC must make modifications in order to provide CLECs with such access. Therefore, if the ILEC

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<sup>110</sup> Id.

provides the same “combination” (even if the ILEC in other instances does not label it a combination of network elements) in its network, it must do so for the CLEC and the CLEC’s end-users. For example, ILECs might argue that there are no “pre-existing” combinations for customers at new addresses. Similarly, ILECs could argue that there are no “pre-existing” combinations for customers switching from one CLEC to another. Neither, of these interpretations of the rule, however, are consistent with the Act or the Commission’s existing rules concerning combinations.

For similar reasons, NEXTINK requests that the Commission prohibit ILECs from degrading CLEC access to combinations through the imposition of non-cost-based “glue charges.” ILECs have delayed or eliminated the practical usefulness of combinations over the last three years by imposing these excessive charges on top of the cost-based rates CLECs must pay for network elements. Many state commissions have accepted or approved these charges under the Eighth Circuit’s decision in Iowa Utils. Bd. v. FCC. The Commission should now explicitly prohibit ILECs from imposing non-cost based charges on the provision of combinations.

**1. The Commission Should Require ILECs to Make Available Any Technically Feasible Combination.**

The Supreme Court’s rejection of the Eighth Circuit’s interpretation of Section 251(c) is evidence that the Eighth Circuit erred in vacating Rule 315(b), and the Commission’s other combination rules. The Supreme Court did not reinstate the other Commission rules pertaining to combinations because those rules, Rules 315(c)-(f), were not before it. Since the Supreme

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<sup>111</sup> First Local Competition Order, 11 FCC Rcd at 15648.

Court's decision, the Commission and other parties have sought to address this open issue by petitioning the Eighth Circuit to reinstate or remand Rules 315(c)-(f).<sup>112</sup> The Eighth Circuit, however, has failed to act on these requests. Thus, consistent with the Supreme Court's affirmation of the Commission's interpretation of the combination requirement in Section 251(c), NEXTLINK urges the Commission to adopt a new rule requiring ILECs to provide UNEs in any technically feasible combination.

**2. The Commission Should Reaffirm that ILECs May Not In Any Way Restrict the Use of UNE Combinations.**

As discussed above with respect to ILEC efforts to restrict CLECs' use of the extended loop UNE, the Commission must confirm that ILECs cannot place limits on the use of combined UNEs. In its First Local Competition Order, the Commission expressly made clear that UNEs are available to CLECs for the provision of any "telecommunications service."<sup>113</sup> This conclusion is in no way limited to CLECs' use of discrete UNEs. Rather, it extends to the use of combinations as well. This conclusion is confirmed by the language of Commission Rule 309(a) which states that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in a manner that the requesting telecommunications carrier intends."<sup>114</sup>

ILEC restrictions on CLECs' use of combinations not only would run afoul of Section 251 and the Commission's rules and decisions implementing it, but such restrictions also would

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<sup>112</sup> See e.g., Iowa Utils. Bd. v. FCC, Response of the Federal Respondents to Local Exchange Carriers' Motion Regarding Further Proceeding On Remand and Motion for Voluntary Partial Remand (March 19, 1999).

<sup>113</sup> First Local Competition Order, 11 FCC Rcd at 15632-33. (citations omitted).

contravene the Commission's Advanced Services MO&O and the general advanced services mandate in Section 706. As the Commission found in its Advanced Services MO&O, the pro-competitive provisions of the Act, including Sections 251 and 706:

[A]pply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets.<sup>115</sup>

NEXTLINK, therefore, requests that the Commission act preemptively by foreclosing restrictions on requesting carriers' use of UNE combinations.

**3. To Prevent Unnecessary Litigation, the Commission Should Identify Specific Combinations that Must Be Provisioned Under Rule 315(b).**

Based on previous ILEC efforts to exploit technicalities in Commission rules, it is imperative that the Commission provide explicit guidance concerning combinations if Rule 315(b) is to have its intended effect. In order to preempt unnecessary litigation and delay, NEXTLINK requests that the Commission explicitly identify the following combinations that ILECs should be required to provide under Rule 315(b):

- a loop/concentration-routing/transport combination;
- a transport/multiplexing-routing/transport combination; and
- an inside wire/NID/loop or sub-loop combination.

NEXTLINK's request that the Commission explicitly require ILECs to provide these three combinations should not be taken to suggest that other combinations, or parts of the combinations suggested by NEXTLINK, should not be required under Rule 315(b). Instead, by

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<sup>114</sup> 47 C.F.R. § 51.309(a).

<sup>115</sup> Advanced Services MO&O, 13 FCC Rcd at 24017.

identifying a minimum number of combinations, the Commission will provide certainty to competing carriers and reduce the number of disputes that arise under Rule 315(b).

**a. Combinations of Loops, Concentration/Routing Devices, and Transport.**

As NEXTLINK discussed above, it is essential for competitors to obtain access to transport functionality comprised of a loop, concentration/routing equipment, and transport.<sup>116</sup> NEXTLINK urges the Commission to clarify its loop definitional rules to require ILECs to provide the extended loop at CLEC request. However, whether the Commission provides competitors with access to the extended loop by modifying its loop definition, or by requiring ILECs to provide a combination of loop, concentration/routing equipment, and transport, it is critical that new entrants have access to the extended loop functionality.

**b. Combinations of Transport Between ILEC Offices with Transport Between ILEC Offices and CLEC Nodes.**

As NEXTLINK discussed above, the Commission has made it clear that the ILECs obligation to provide unbundled transport includes an obligation to provide unbundled access to interoffice facilities between ILEC end offices and to interoffice facilities between ILEC and CLEC end offices. It is also necessary for the Commission to identify that the combination of discrete transport segments and intervening routing/muxing equipment is required under Rule 315(b). ILECs routinely combine discrete transport segments for themselves. Indeed, this is the only way that end office-to-tandem-to-end office connections are made. To curb this anti-competitive practice, NEXTLINK submits that the Commission should explicitly find that transport/routing-muxing/transport combinations are required under Rule 315(b).

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<sup>116</sup> See Section III.A.1.c.2. supra for a discussion of Extended Loops.

**c. Combinations of Loops or Subloop Components with Inside Wire.**

Above, NEXTLINK set forth the need for the Commission to require ILECS to provide CLECs with access to inside wire owned or controlled by the ILEC. As NEXTLINK discussed above, access to the “last hundred feet” controlled by the ILEC is, in and of itself, critical to reaching many customers. For many premises, however, a combination of loop (including distribution cable and remotely deployed electronics), NID and inside wire is necessary to provision service to the end-user. ILECs deploy such combinations in their own provisioning of services to end-users. To compete on a level playing field, facilities-based competitors must have cost-based access to the same combinations. To ensure such access, the Commission should affirmatively find that cost-based access to UNE combinations consisting of inside wire, the NID, and the loop or sub-loop elements, including distribution cable and remotely deployed electronics, is required under Rule 315(b).

**III. CONCLUSION.**

Accordingly, for the reasons described herein, NEXTLINK respectfully requests that the Commission adopt the rules and policies NEXTLINK has proposed.

Respectfully submitted,  
NEXTLINK COMMUNICATIONS, INC.

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